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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202647

DATE: June 17, 1981

MATTER OF: James M. Smith, Inc.

DIGEST:

Procedure requiring post-bid opening submission and possible negotiation of unit prices for contract solicited by formal advertising is improper since procedure is not consistent with legal requirements governing formal advertising.

James M. Smith, Inc., protests the proposed award of a contract to J.R.W. Enterprises, Inc., resulting from invitation for bids (IFB) No. N62470-81-B-2759 issued by the Naval Facilities Engineering Command (NAVFAC). The IFB sought bids to furnish all necessary bus and taxi services at the Norfolk Naval Shipyard, Portsmouth, Virginia. Smith, the second low bidder, contends that J.R.W.'s low bid should be rejected as nonresponsive.

Our review of the entire record here reveals a fundamental defect in this procurement, unrelated to whether or not J.R.W.'s bid is responsive, which would render improper any award under the IFB as presently structured. Therefore, we recommend cancellation of the instant IFB and correction of the deficiency in any resolicitation.

The defect to which we refer concerns the IFB requirement that bidders submit at bid opening only a total price for the seven line items of bus and taxi services required, but that the low bidder, within 10 days after bid opening, complete a Schedule of Prices for the seven line items and submit it for approval by the contracting officer. The approved Schedule of Prices would become a part of the contract on award, and would "provide the basis for payments and for any withholding." The IFB further provided

*[Protest Alleging That Awardee's Bid Should Have Been
Rejected as Nonresponsive]*

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that unbalancing in the Schedule of Prices submitted after bid opening would be cause for withholding approval and requiring resubmission of a balanced Schedule, and may result in bid rejection.

In a decision issued five months before the instant IFB was issued, Garrett Enterprises, Inc., B-196659, September 29, 1980, 59 Comp. Gen. ____ (1980), 80-2 CPD 227, we held that this same NAVFAC procurement method was improper. We held that the Navy should require the submission of unit line item prices with the initial bids for the following reasons:

"* * * The statutory provision governing contract awards in formally advertised procurements, 10 U.S.C. § 2305(c) (1976), requires award based on the bid determined to be 'most advantageous to the United States, price and other factors considered.' That provision contemplates that the solicitation and the responding bids establish, at bid opening, the material terms of the contractor's obligation--those factors which should define the bid's responsiveness--in order to make the award determination. Storage Technology Corporation--Reconsideration, 57 Comp. Gen. 395, 398 (1978), 78-1 CPD 257; Computer Network Corporation, 55 Comp. Gen. 445, 451 (1975), 75-2 CPD 297.* * *

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"Further, the effect of the failure to require unit prices at bid opening, thereby essentially leaving the bidder with no real obligation based on the bid as submitted to perform any item of work at any particular price, was to give the bidder the option to accept or reject an award after bids were opened and prices exposed; the firm could at its whim refuse to submit a completed Schedule of Prices, or could submit an unacceptable one after

seeing the results of the competition. This reservation of control over the bid's acceptability after its submission consistently has been criticized as being clearly inimical to the advertised procurement process. See, e.g., Computer Network Corp., supra.

"Finally, reserving the right after bid opening to require a bidder to 'resubmit' acceptable Schedule prices in the event of 'unbalancing' improperly contemplates negotiation of the material contract terms in an otherwise formally advertised procurement."

On reconsideration of that decision requested by the Navy, we affirmed our finding that the Navy's procurement method was prohibited and restated our recommendation that the Navy require bidders to submit a Schedule of Prices with their bids in future procurements. Garrett Enterprises, Inc. -- Reconsideration, B-196659.2, February 6, 1981, 81-1 CPD 70. We note that the date of the decision on reconsideration is almost three weeks before the instant IFB was issued.

The Navy advises that no award has been made under this IFB. Under the circumstances, we recommend that it be canceled and the requirement resolicited in accordance with the cited decisions. In view of this recommendation, it is academic whether J.R.W.'s bid was nonresponsive.


Acting Comptroller General
of the United States